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No. 91-1427

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH R. KLINEBURGER,

Petitioner,

v.

MARITRANS, MARITRANS OPERATING PARTNERS L.P. and MARITRANS G.P., Inc.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF MARITRANS OPERATING PARTNERS L.P. AND MARITRANS G.P., INC. IN OPPOSITION

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COUNTER-QUESTION PRESENTED FOR REVIEW

Whether the plaintiff, a seaman, is precluded as a matter of federal law from recovering from a vessel owner solely for emotional injuries allegedly sustained as a result of a two-day experience with a fellow crewman who exhibited eccentric behavior?

PARTIES

Plaintiff, Joseph Klineburger, petitioner herein, was a seaman employed as a barge captain on the petroleum carrying barge INTERSTATE 71.

Respondents are Maritrans Operating Partners L.P. and Maritrans G.P. Inc.[1] (hereinafter collectively referred to as "Maritrans"), the owners/operators of the barge INTERSTATE 71. There is no formal legal entity known simply as "Maritrans," as listed in the caption.

1. Maritrans Operating Partners L.P. is an operating limited partnership. Maritrans G.P. Inc. is the managing general partner of Maritrans Operating Partners L.P. and is not a parent or subsidiary corporation.

TABLE OF CONTENTS

	Page
COUNTER-QUESTION PRESENTED FOR REVIEW	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
CONCISE COUNTER-STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
(1) Certiorari is not warranted since the rulings of the state appellate courts below are not in conflict with a decision of this Court nor of the vast majority of the courts that have addressed this question	5
(2) Certiorari is not warranted since the question does not constitute an important question of federal law which has been decided in conflict with competent legal precedent	7
CONCLUSION	13

TABLE OF AUTHORITIES

Cases: Page

Adkins v. Seaboard System R.R., 821 F.2d 340 (6th Cir. 1987), *cert. denied*, 484 U.S. 963 (1987) . 6

Atchison, Topeka, and Santa Fe Railway Co. v. Buell, 480 U.S. 557 (1987)..... 5, 6, 7, 9

Buell v. Atchison, Topeka & Santa Fe Ry, 771 F.2d 1320 (9th Cir. 1985)..... 12

Carroll v. Consolidated Rail Corp., ____U.S. ____, 112 S. Ct. 916, 116 L. Ed. 2d 816 (1992)..... 6, 9

Ferguson v. Moore McCormick Lines, 352 U.S. 521 (1957) 5

Gaston v. Flowers Transp., 866 F.2d 816 (5th Cir. 1989) 5, 7, 8, 9, 10, 11

Gottshall v. Consolidated Rail Corp., 773 F. Supp. 778 (E.D. Pa 1991)..... 6

Hammond v. Terminal Rail Ass'n., 848 F.2d 95 (7th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989) 6

Holliday v. Consolidated Rail Corp., 914 F.2d 421 (3d Cir. 1990), *cert. denied*, ____U.S. ____, 111 S. Ct. 970, 112 L. Ed. 2d 1057 (1991)..... 5

Kraus v. Consolidated Rail Corp., 723 F. Supp. 1073 (E.D. Pa. 1989), appeal dismissed, 899 F.2d 1360 (3d Cir. 1990)..... 6

Miles v. Apex Marine Corp., 498 U.S. ____, 111 S. Ct. 1410, 112 L. Ed. 2d 275 (1990) 5

Moody v. Main Central R.R. Co., 823 F.2d 693 (1st Cir. 1987) 6

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

Plaisance v. Texaco, Inc., 937 F.2d 1004 (5th Cir. 1991), court en banc argument ordered February 11, 1992, 954 F.2d 266 (5th Cir. 1992) 9, 10, 11

Ray v. Consolidated Rail Corp., ____U.S. ____, 112 S. Ct. 914, 116 L. Ed. 2d 813 (1992)..... 6, 9

Taylor v. Burlington Northern R.R. Co., 787 F.2d 1309 (9th Cir. 1986)..... 9, 10, 12

Statutes:

Federal Employers Liability Act, 45 U.S.C. §51, *et. seq.* 5, 7, 8

Jones Act, 46 U.S.C. §688 *et. seq.* 1, 5, 11

Local Court Rules:

5th Cir. R.41.3 10

Miscellaneous:

Restatement (Second) of Torts §436A (1965) 8

W. Page Keeton et al., *Prosser and Keaton on The Law of Torts,* §54 (5th ed. 1984) 8

OPINIONS BELOW

Respondents acknowledge and accept the listing of the Opinions Below presented by plaintiff at pages 1-2 of his petition.

JURISDICTION

Respondents acknowledge and accept the Statement of Jurisdiction presented by plaintiff at pages 2-3 of his petition.

STATUTORY PROVISIONS INVOLVED

Respondents acknowledge and accept the statement of the Statutory Provisions Involved presented by plaintiff at pages 3-4 of his petition.

CONCISE COUNTER-STATEMENT OF THE CASE

Maritrans is the owner and operator of the petroleum carrying barge INTERSTATE 71. The barge was designed to transport crude oil and petroleum derived products through navigable waters.[2] The vessel and its equipment were seaworthy in all respects and were safely operated.[3]

Plaintiff was the barge captain of the INTERSTATE 71 during the relevant times at issue. On or about June 26, 1989, plaintiff instituted suit against Maritrans under the Jones Act, 46 U.S.C. §688 *et. seq.*, and the

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2. Plaintiff's references in his petition to the barge carrying "ultra-hazardous cargo" is misleading, since it is both factually and legally inaccurate. There is nothing in the factual record of this matter which states or even suggests that the cargo carried by the barge was "ultra-hazardous." Moreover, Maritrans knows of no court which has held that the carrying of petroleum products by barge, tanker vessel, or other means constitutes an "ultra-hazardous" activity.

3. Again, plaintiff has taken improper liberties with the facts. There is nothing in the record of the case which indicates that the barge heaters "required constant surveillance" or "have a tendency to catch fire," as stated by plaintiff on page 6 of his petition.

general maritime law for unseaworthiness, alleging in his complaint that, in July of 1986, he suffered "severe disabling anxiety and depression" as a result of a brief encounter with a fellow seaman, Charles Edwards, on the barge. Edwards had reported to the barge as a tankerman and, several days later, for unknown reasons, jumped overboard and swam ashore.

Plaintiff had sailed on Maritrans' barges from 1970 to December, 1986. During the sixteen year period he sailed with Maritrans, plaintiff experienced numerous calamitous events (e.g. the death and injuries of several seamen, fires, explosions, collisions) and came into contact with numerous "peculiar" people. He claimed that these experiences affected him emotionally. In fact, plaintiff ultimately applied for Social Security benefits, alleging psychiatric disability based on job related stress brought on by his cumulative sea going experience.

Despite these experiences, which he admitted affected his psychological state of mind, plaintiff, in the present suit, alleged that the emotional injuries forming the basis for all his claimed damages were related to his two day experience with Edwards. Plaintiff pleaded that this experience caused him "emotional strain and stress, emotional instability."

The primary event involving Edwards which allegedly bothered plaintiff, occurred just prior to Edwards' unexpected departure from the vessel. Plaintiff, Edwards, and several other crewman, including A.B. Steven Gardner, were in the galley of the barge having a conversation. At one point, Edwards brought out an antihistamine inhaler, took some of the antihistamine in his mouth, put a lighter near to his face, and blew a flame at Gardner. The flame did not injure anyone, although Gardner had to be restrained from attacking Edwards. Plaintiff told Edwards to straighten up. Edwards reacted passively, sat quietly, and pouted. Plaintiff was concerned about the incident, but confirmed that he was not intimidated by or scared of Edwards. Plaintiff stated that Edwards never threatened him or anyone

else, as far as he knew. Plaintiff never saw Edwards touch anybody.

The "fire" incident caused plaintiff to be concerned for the safety of the barge. Plaintiff claimed that it put a great deal of stress on him, caused him and the other tankerman to do extra work, and caused plaintiff to lose one night's sleep.

Aside from normal vacations, plaintiff never missed a trip on the barge from July, 1986, the time of the Edwards' incident, to December, 1986, when he ultimately got off the boat. During these six months, plaintiff never told anyone at Maritrans that Edwards had affected him. Plaintiff testified that he never told anybody, other than his counsel, about Edwards.[4]

Following plaintiff's departure from the barge, plaintiff was treated by a psychologist and a physician. The reports of these treating specialists do not attribute plaintiff's emotional problems to any one specific incident. The reports relate plaintiff's condition to a "variety of injury and life threatening experiences" caused by "close calls at sea, accident, injuries, explosions, fire, and death." No medical records discussed or even referenced an incident involving Edwards or a seaman in July, 1986.

Maritrans filed its motion for summary judgment with the trial court on December 18, 1989. The basis for the motion was that, even assuming that the Maritrans' vessel was unseaworthy as a result of the presence of Edwards – which the lower court was required to do in considering the motion – plaintiff's suit must be dismissed since his damages consisted only of emotional claims of injury. The motion contended that recovery for

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4. On page 7 of his petition, plaintiff erroneously states, as fact, that when Edwards departed, the vessel "carried an inadequate and incomplete" crew. No independent evidence has ever been offered nor has a ruling been made that the crew's complement was inadequate.

non-physical impact injury, solely emotional in nature, is precluded as a matter of federal admiralty law.

The trial court, relying on this established precedent, granted the motion. The Pennsylvania Superior Court, citing the same precedent and rationale, affirmed the lower court's ruling. The Pennsylvania Supreme Court deemed it inappropriate or unnecessary to consider the question and denied plaintiff's petition for Allowance of Appeal, thereby leaving in place the ruling of the Superior Court.

SUMMARY OF THE ARGUMENT

Plaintiff is a seaman who claims to have sustained solely emotional damage while onboard a vessel plowing navigable waters. He alleges that as a crewman on the vessel, he witnessed several peculiar incidents involving a fellow seaman over a two day period; and, although he was not threatened, frightened, or intimidated by the actions of this seaman, plaintiff claims to have been emotionally affected by the incidents. However, since plaintiff sustained purely emotional injury, he is precluded from recovering any damages from the vessel owner as a matter of federal admiralty law. The courts below correctly applied this federal law and a further review of their rulings is unnecessary.

Most significantly, there are no special and important reasons for this Court to consider this matter. The overwhelming precedent, backed by common law, acknowledges that there may be no recovery for a seaman who sustains solely psychological injury. The precedent and the decisions of the lower courts, including the Pennsylvania Superior Court, are consistent and do not conflict with this Court's prior interpretation of the controlling federal law on this question.

ARGUMENT

(1) Certiorari is not warranted since the rulings of the state appellate courts below are not in conflict with a decision of this Court nor of the vast majority of the courts that have addressed the question.

In *Atchison, Topeka, and Santa Fe Railway Co. v. Buell,* 480 U.S. 557 (1987), this Court reserved ruling on whether a railroad worker could maintain a suit for purely psychological damage under the Federal Employers Liability Act, 45 U.S.C. §51, *et. seq.* (hereinafter the "FELA"). Of course, cases decided under the FELA are precedent in seamen's cases, since the FELA was used as the basis for the Jones Act which incorporates its provisions. *Miles v. Apex Marine Corp.,* 498 U.S. ____, 111 S. Ct. 1410, 112 L. Ed. 2d 275 (1990); *Ferguson v. Moore McCormick Lines,* 352 U.S. 521 (1957).

Buell specifically left open the issue of emotional damage, allowing each situation to be decided by the individual courts, based on the unique facts of each case:

> . . . the question whether one can recover for emotional injury may not be susceptible to an all inclusive "yes" or "no" answer. As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand. 480 U.S. at 570.

Seizing upon this instruction, the vast majority of courts which have considered the issue of the recoverability of damages for purely emotional injuries in Jones Act/FELA cases under the *Buell* guidelines, have either denied recovery or have suggested their intention to do so. See for example, *Holliday v. Consolidated Rail Corp.,* 914 F.2d 421 (3d Cir. 1990), *cert. denied,* ____ U.S. ____ , 111 S. Ct. 970, 112 L. Ed. 2d 1057 (1991); *Gaston v. Flowers Transp.,* 866 F.2d 816 (5th Cir. 1989);

Hammond v. Terminal Rail Ass'n., 848 F.2d 95 (7th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989); *Moody v. Main Central R.R. Co.*, 823 F. 2d 693 (1st Cir. 1987); *Adkins v. Seaboard System R.R.*, 821 F.2d 340 (6th Cir. 1987) *cert. denied*, 484 U.S. 963 (1987); *Gottshall v. Consolidated Rail Corp.*, 773 F. Supp. 778 (E.D. Pa 1991); *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. 1073 (E.D. Pa. 1989), appeal dismissed, 899 F.2d 1360 (3d Cir. 1990). These rulings have not been decided in a way which appears to conflict with the intent of the Court in *Buell* in 1987 or in today's legal environment. In this regard, reference is made to *Ray v. Consolidated Rail Corp.*,____ U.S. ____, 112 S.Ct. 914, 116 L. Ed. 2d 813 (1992) and *Carroll v. Consolidated Rail Corp.*, U.S. ____, 112 S. Ct. 916, 116 L. Ed. 2d 816 (1992) in which this Court, only two and a half months ago, denied petitions for writs of certiorari from the Seventh and Third Circuit Courts of Appeals, which courts had dismissed claims for purely emotional damage under the FELA.

The Pennsylvania Superior Court, in the present matter, fully acknowledged the propriety of the precedent which has sprung from *Buell* and its progeny. Applying this federal law, the court recognized that plaintiff was allegedly harmed emotionally while engaged in his regular employment as a barge captain. He was never personally threatened in his job by the irrational seaman, Edwards, nor was he a witness to any serious physical injury to someone else. (A.35a-36a). Of course, plaintiff never sustained any physical injury or even physical contact. Under these circumstances, the state appellate court found:

> . . . that there can be no recovery under the Jones Act for the psychological and physical manifestations of job related stress alleged by the plaintiff - appellant. (A.36a)

The appellate court, like the many courts which have considered the issue, acted properly and in accordance with this Court's guidelines in *Buell.* Since no conflict exists with that decision, this does not constitute a "special and important" reason for the granting of a writ of certiorari.

(2) Certiorari is not warranted since the question does not constitute an important question of federal law which has been decided in conflict with competent legal precedent.

The overwhelming precedent recognizes that there should be no recovery for purely emotional injury to a seaman. The recognition of this precedent has not been developed without rational and sound basis. The Fifth Circuit Court of Appeals, in denying a seaman's psychological claim in *Gaston v. Flowers Transp.,* outlined many of the legitimate reasons which weigh in favor of denying recovery. The court justified this denial, in part, based on the fact that seamen and FELA employees voluntarily select professions in which certain hazards are inherent. Payment of compensation for emotional injuries arising from such acknowledged, traditional, and accepted hazards would be illogical and inappropriate:

> [T]here seems to be something incongruous in undertaking such an extension of liability to seamen and railroaders. *These have knowingly and voluntarily chosen callings which, while today perhaps not fairly termed dangerous, yet do involve braving certain hazards and are traditionally not well suited to the squeamish or fainthearted.* To undertake to enlarge such persons in damages in proportion to the delicacy of their emotional reactions seems a curious policy. (emphasis supplied) 866 F.2d at 820.

The *Gaston* court was also quite concerned about opening a Pandora's box of vessel owner liability which historically has been closed. The traditional common law has always denied liability for emotional injuries without physical impact or at least threat of physical impact and injury. See e.g. W. Page Keeton et al., *Prosser and Keaton on The Law of Torts,* §54 (5th ed. 1984). This provided a means to prevent recovery for fraudulent claims of psychological harm. Restatement (Second) of Torts §436A (1965). The *Gaston* court adopted this established authority, stating, as to the Jones Act and the FELA, that to construe:

> . . . these federal workers' compensation acts to cover bystanders' injuries would represent a major departure from existing jurisprudence, as well as a vast extension of potential employer exposure to damages. 866 F.2d at 819.

The court concluded that "permitting such a recovery, not for such injuries resulting from physical trauma to the plaintiff, or even from his fear of such trauma to himself, but for emotional injury stemming from witnessing a bad sight" would improperly expand the bounds of recovery. *Id.* In fact, the courts have generally not done so; and the *Gaston* panel noted that the reason why is clear. To allow such relief would create "random and wayward" actions with potentially disastrous financial ramifications for employers. *Id.* at 820.

In the footnote following this text, the court commented on the extraordinary detriment of allowing such "random and wayward" recoveries. The court alluded to the practical non-insurability of protecting railroad and shipping companies from such nebulous claims; the prohibitive costs in recognizing such liability which would threaten the very existence of some of these businesses; the number of jobs which would be lost; the difficulty in determining the true psychological effect of

witnessing a single traumatic event; and the potential for many bogus injuries and fraudulent claims. 866 F.2d at 820, n.3.

The very concerns voiced by the *Gaston* panel and courts like it, including the Pennsylvania appellate court herein, are present in this case. There is a serious question as to whether the injuries of plaintiff, Klineburger, legitimately can be traced to a two day incident involving one seaman, in the face of plaintiff's eventful and "stress filled" sixteen year seagoing career. Allowing an avenue of recovery for emotional claims in this situation would result in obvious causation problems and questions concerning the veracity of the claim itself.

The issue of whether a seamen should recover for purely emotional damages is an important federal question; but it is one which already has been determined correctly by nearly every court which has considered the question. *Buell* permitted the courts the freedom to develop the law, and they have done so, for the most part, properly and in accordance with the dictates of this Court. That the development of the law has proceeded in satisfaction of the Supreme Court mandate is evidenced by the two recent denials of petitions for writs of certiorari on the issue, *Ray v. Consolidated Rail Corp.*, and *Carroll v. Consolidated Rail Corp.;* the vast supporting precedent from the courts around the country; and the Pennsylvania Supreme Court's determination in this matter that it was unnecessary to hear the issue.

Faced with this overwhelming weight of legitimate, well-reasoned authority, plaintiff is left only with the questionable decision in *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir. 1991), court en banc argument ordered February 11, 1992, 954 F.2d 266 (5th Cir. 1992) and the reluctant Ninth Circuit precedent embodied by *Taylor v. Burlington Northern R.R. Co.*, 787 F.2d 1309 (9th Cir. 1986), to support his petition that this is a federal question worthy of consideration by the Court.

It is acknowledged that *Plaisance* and *Taylor* technically represent a split in authority with the Pennsylvania Superior Court in this matter and the five federal Circuit Courts of Appeal which have addressed the issue. However, while the body of precedent which bodes against recovery for purely emotional harm is vast, well-developed, and confident in its position, both the *Plaisance* and the *Taylor* opinions are vulnerable and internally defective. As a result, their value in support of whether the question should be considered is minimal at best.

Plaisance does not represent adequate authority to justify certiorari for several reasons:

(1) The opinion of the panel in *Plaisance* is presently under scrutiny. The matter is scheduled to be argued before the Fifth Circuit Court of Appeals on a rehearing en banc, during the week of May 11, 1992. The granting of a rehearing en banc has the effect of vacating the original panel's opinion and judgment and staying the mandate. 5th Cir. R.41.3. Thus the opinion in *Plaisance* is, at this time, not controlling legal precedent.

(2) *Plaisance* is not a bystander liability case – as is *Gaston v. Flowers Transp.,* 866 F.2d 816 (5th Cir. 1989). Even the *Plaisance* court acknowledged that *Gaston* is still the law in that jurisdiction, with regard to bystander liability. Klineburger, plaintiff herein, is clearly a bystander to the factual events which form the basis for his cause of action. He was, at all relevant times, merely a witness, never himself endangered or threatened. The contention in plaintiff's petition that he was not a bystander; but that he was a "participant," is a transparent attempt to distinguish the well-reasoned holding in *Gaston.* It is an exercise in semantics and, simply put, offers a mischaracterization of the factual circumstances.

(3) Although the *Plaisance* court recognized that, in theory, a claim for emotional injuries under the Jones Act may exist, finding a situation which permits such a recovery may be difficult. In fact, the plaintiff, Plaisance, was himself denied recovery by the appellate panel. *Plaisance* was a vessel captain responding to and involved in a serious marine explosion and fire. During that time he had a perception that he and others could be killed. However, the court, citing *Gaston,* acknowledged "that seamen and railroaders have chosen callings that 'involve braving certain hazards [which] are traditionally not well suited to the squeamish or faint hearted.'" 937 F.2d at 1011. With this as a basis, the Fifth Circuit affirmed the lower court's dismissal of plaintiff's emotional injury claim. Klineburger, plaintiff herein, was only a bystander to events. Unlike *Plaisance,* he never even believed he was threatened or in any danger. Even under the liberal standard suggested by *Plaisance,* there can be no liability here for alleged emotional damages.

(4) The strong dissent in *Plaisance* makes several salient points. Among them is that the majority opinion is dangerously bucking the overwhelming weight of authority that carefully avoids allowing recovery for emotional injuries without attendant physical harm. This authority is well established and "partly designed to prevent feigned claims of emotional injury." 937 F.2d at 1012. The dissent confirms the validity and viability of *Gaston* and its rationale; and recognizes the impracticability and difficulty of actually applying the majority's "full recovery rule," which effectively condones suspect claims with "their proneness to triviality or falsity." *Id.* at 1013.

The other jurisdiction which has failed to confirm the impropriety of recovery by seamen/railroaders for emotional injury is the Ninth Circuit. Nevertheless, the

last pronouncement by the Court of Appeals in the circuit is, by the court's own admission, suspect. In *Taylor v. Burlington Northern R.R. Co.,* the appellate panel was compelled to follow its prior ruling in *Buell v. Atchison, Topeka & Santa Fe Ry,,* 771 F.2d 1320 (9th Cir. 1985), which had allowed recovery for emotional damage.[5] However, the court was clearly disturbed in allowing such a recovery in the face of conflicting, better reasoned results in other jurisdictions: ". . . despite our reservations, we are bound by *Buell.*" 787 F.2d at 1313. Nonetheless, solace was taken in this case, since the plaintiff might indeed have sustained physical injury. The court rationalized that: "Even, if *Buell* were not binding, however, it is not clear from the record before us that appellant presents no evidence of a physical touching or injury." *Id.* Thus the court was satisfied that it had reached the right result – even though it was for the wrong reason.

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5. The *Taylor* opinion was issued prior to this Court's review of the Ninth Circuit's *Buell* decision.

CONCLUSION

The Pennsylvania Superior Court correctly applied the prevailing and almost universally accepted law in denying recovery to a seaman who allegedly suffered purely emotional injury. The court's ruling is not in conflict with a decision of the United States Supreme Court nor does it present an important federal question which warrants this Court's consideration. There being no special and important reasons for this Court to review the holding of the Pennsylvania Superior Court, the petition of plaintiff for writ of certiorari should be denied.

Respectfully submitted,

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